UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

October 23, 2009

10:07 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

HEARING re Metavante Corporation's Motion to Alter or Amend the Court's Order Granting Lehman Brothers Special Financing Inc. and Its Affiliated Debtors' Motion to Compel Performance and Enforce the Automatic Stay

FSB

HEARING re Metavante Corporation's Motion for an Order Staying the Effect of the Court's Order Granting Lehman Brothers Special Financing Inc. and Its Affiliated Debtors' Motion to Compel and Enforce the Automatic Stay

Transcribed by: Lisa Bar-Leib

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for Debtors
767 Fifth Avenue
New York, NY 10153

BY: RICHARD W. SLACK, ESQ.
ROBERT J. LEMONS, ESQ.

MILBANK, TWEED, HADLEY & MCCLOY LLP
Attorneys for Official Committee of Unsecured Creditors
One Chase Manhattan Plaza
New York, NY 10005

BY: EVAN R. FLECK, ESQ.

BAKER HOSTETLER, LLP
Co-counsel for Metavante Corporation
45 Rockefeller Plaza
New York, NY 10111

BY: RICHARD J. BERNARD, ESQ.

WHYTE HIRSCHBOECK DUDEK S.C.
Co-counsel for Metavante Corporation
555 East Wells Street
Suite 1900
Milwaukee, WI 53202

BY: BRUCE G. ARNOLD, ESQ.

CHAPMAN & CUTLER LLP
Attorneys for US Bank, N.A.
111 West Monroe Street
Chicago, IL 60603

BY: FRANKLIN H. TOP, III, ESQ.
JAMES HEISER, ESQ.
(TELEPHONICALLY)

STUTMAN TREISTER & GLATT

Attorneys for Elliott Company

1901 Avenue of the Starts

12th Floor

Los Angeles, CA 90067

BY: JEFFREY H. DAVIDSON, ESQ.

WHITMAN L. HOLT, ESQ.

(TELEPHONICALLY)

P R O C E E D I N G S

THE COURT: Be seated, please. Good morning. Mr. Slack?

MR. SLACK: Good morning, Your Honor. Richard Slack from Weil Gotshal. We are here this morning on two matters both relating to Metavante. The first one on the calendar is Metavante's motion to alter or amend the Court's order granting Lehman Brothers' motion to compel performance and enforce the automatic stay. And before I turn the floor over to Metavante's counsel, Your Honor, I did want to inform the Court that the parties this past week -- the principals have spoken or communicated. They've exchanged proposals. But my understanding is the proposals, at least last I heard, are far apart. But the parties at least did exchange proposals, Your Honor.

THE COURT: Well, that's positive. Mr. Arnold, do you want to start?

MR. ARNOLD: Good morning, Your Honor. May it please the Court, Bruce Arnold at Whyte Hirschboeck Dudek SC on behalf of Metavante. I'm joined by my co-counsel this morning, Rich Bernard, from the firm of Baker Hostetler.

THE COURT: Good morning, Mr. Bernard.

MR. BERNARD: Good morning.

MR. ARNOLD: Begging the Court's indulgence, I'd like to start with the same comment and echo the sentiments

expressed by Mr. Slack. Mssrs. Slack, Lemons and Arnold spoke last Monday following the chambers conference which occurred a week ago today. And I'm grateful to Mr. Lemons, in particular, for providing some contact information for folks at the highest levels of Lehman.

On Tuesday, the businesspeople at FIS and the business folks at Lehman did have such a conversation. And on Wednesday, a formal settlement proposal, in a letter that I sent to Rich and Rob, was sent to them. Rule 408 precludes us from having a discussion in your presence, Your Honor, about the substance of those discussions, but I wanted the Court to know that the message you sent last Friday in the chambers conference was received loud and clear.

There is a disparity between the two parties' positions but I'm encouraged because of the construct that folks are looking at which is around the concept of an early termination and discussions about the mark to market and interest rates and so forth. It does give me some encouragement that there's a way to resolve this case. And I'm not going to say anymore than that except to say that quite high level discussions have gone on this week and I wanted to Court to be aware of that.

THE COURT: Good. I appreciate the update and I don't want to know any of the details. Let's deal with what's in front of me today, however. You have two motions pending.

MR. ARNOLD: With respect to the new motions that are pending, I'll start, of course, Your Honor, by saying thank you for accepting the letter briefs which were filed on October 13th and 16th, respectively, as the parties' final pleadings on this matter. And in the spirit of our dialogue in the chambers conference, certainly would be willing to say, Your Honor, that Metavante, and perhaps the debtors as well, stand on their pleadings. And if it's this Court's pleasure simply to rule on the motions that are before the Court, I'm happy to stand down and accept that as the Court's direction for how to conduct this hearing. If it is your pleasure to entertain some oral argument, I have relatively few comments to add to the points that are already in the letter briefs and in the pleadings and we'll take our lead from how the Court wants to conduct the hearing today.

THE COURT: Well, we're all here and we have, I think, public interest in the issues that are presented. I would certainly welcome any comments that you or Mr. Slack or the creditors' committee, for that matter, may have before making any rulings.

And I think that it makes sense to approach this first with comments on the motion to alter or amend and then comments in connection with the motion for a stay. So --

MR. ARNOLD: Very well, Your Honor.

THE COURT: -- I think we can hear them both at the

same time. I'm just suggesting that order.

MR. ARNOLD: I'll be brief because I want to be mindful of the length of our reply letter and the amount of pleadings the Court has already had to look at.

Since we're here today and have the opportunity to talk about the unique nature of an interest rate swap agreement and in the context of an order that you've already entered that compels Metavante to perform according to the terms of the interest rate swap agreement, here's how Metavante tried to marry together the dictates of the Supreme Court decision in NLRB v. Bildisco and a series of cases like Chateaugay and Faline (ph.) and McLean Industries and so forth that were cited by Lehman and relied upon by the Court, especially the McLean decision and NLRB v. Bildisco.

In contrast, the cases involving the sale of gasoline or other essential goods and services that the courts were loathe to allow the nondebtor counterparty to continue providing pending the outcome of the decision by the debtor to assume or reject the executory contract, the nature of an interest rate swap agreement is a somewhat different animal than a typical executory contract. I acknowledge that using phrases like it's a garden variety contract or not doesn't advance the discussion. But at its essence, an interest rate swap agreement is an exchange of cash flows. And from Metavante's perspective, Your Honor, the economic glue that

holds an interest rate swap agreement together, the essence of the consideration is the ability to net setoff and, depending upon the circumstances, terminate the interest rate swap agreement.

So we sought -- in begging your indulgence, of course, we sought the opportunity to reconsider or to alter or amend in some respect your decision, Your Honor, to see whether the Court would be willing to give voice to some way of protecting Metavante's interest in connection with a contract that it has been ordered to perform. And in that vein, the concept of Metavante articulated is if we don't have the ability to withhold payments and the market turns and Metavante is then in the money, what happens with respect to the payments that Metavante has already paid? Then the market turns and if the debtor has not yet rejected the contract then the debtor would be in a position of having to make a reset payment. Say, on February 1st. There's a reset payment due on November 1st. I think we can all state for the record that with a ninety day LIBOR at .23 or so that Metavante is not in the money with respect to the upcoming payment due on November 1st.

But if the market changes and on February 1st, 2010, Lehman now owes a payment to Metavante, the thought occurred to us, and hence the motion to alter or amend, whether the Court would want to protect or at least address the rights of the nondebtor counterparty during the pendency of the time that the

debtor decides to assume or reject. We are firmly in that gray area pre-assumption or rejection.

So the essence of the motion to alter or amend goes off of this concept of how does the Court respect the interest of the nondebtor counterparty in the circumstances here. We've seen in the cases collected and before this Court that Courts have taken a number of creative approaches. Causically, in both the McLean case and some of the other cases involving natural gas, interestingly enough, Courts set a fairly early date to assume or reject so that the nondebtor counterparty, while it was ordered to continue to perform, had sort of a date certain by which it -- when it would know whether it would continue to have to perform or not. Courts have said, of course, that while you continue to perform, nondebtor party, you're entitled to be paid for the goods or services that you receive (sic).

In the context of an interest rate swap agreement where the currency, the economic glue of the transaction, is a swap of cash flows and certain contractual rights, including the rights to net, setoff or terminate, Metavante thought that the idea of creating an escrow might be a suitable way to protect both the rights in the future and the debtors' rights now. Hence our motion to alter or amend, to ask the Court to at least consider the "what if" when or if the market turns.

So that's all I want to add on the motion for

adequate protection, Your Honor. That's how Metavante sort of agrees this interesting line of cases starting with NLRB v. Bildisco and, of course, going through the McLean decision, Judge Buschmann's famous decision on this topic. You know how we think that McLean is distinguished because of the existence of a pre-petition default. But we're not here to have a -- what is the phraseology -- a second bite at the apple in terms of rearguing the merits. We appreciate, Your Honor, the narrow purview of a motion to alter or amend.

THE COURT: You haven't commented on default interest.

MR. ARNOLD: On default interest, the issue is intriguing at three different levels. And again, I'll be brief. Going back to the pleadings originally filed in this Court on May 29th, this Court is aware that the motion contains the unsupported allegation that, at least as of May 29th, 2009, Metavante owed default interest of "approximately $359,215.37". I can tell you, Your Honor, that in the context of these settlement discussions, Metavante asked and received a calculation from Lehman that shows what the current default interest rate is and so forth and how it was calculated.

The essence of the default interest argument doesn't necessarily turn on a calculation. Even I can perform a calculation that takes the ninety day LIBOR rate and somebody's state cost of funds and then adds the one percent delay rate

that is embedded in the standard 1992 ISDA master agreement. The default interest rate for us is interesting in a quite different way. Number one, the concept of default interest flows from what? A default. Here, you have the interesting scenario where it is alleged that both Metavante and Lehman are in default. Metavante has staked out the position that as to its interest rate swap agreement, LBHI's pre-petition, at least as to LBSF, Chapter 11 filing and its flunking of the so-called specified indebtedness requirements constituted a pre-petition default excusing Metavante's performance. And not getting into New York law and the Section 2(a)(iii) arguments and so forth. Only asking the Court to appreciate that Metavante raised the default interest issue from the perspective of saying what happens when both parties putatively claim that the other is in default. Is there, in fact, an entitlement to default interest?

The second question, and putting aside whether the Court feels that it was necessary to entertain evidence or testimony or some kind of record to support the calculation, like one of the cases cited by Lehman, the Finance One Public Company decision, was intriguing in the sense that there, the special manager of that company certified the cost of funds and then provided examples of what that entity's cost of money is by giving the other party, ironically LBSF, ten promissory notes demonstrating the interest rates at which that entity was

borrowing money.

Here, while acknowledging that the bar is set fairly low in terms of how the default rate is proven or established and so forth, what intrigued Metavante and hence the footnote in our letter to Your Honor, is that Lehman stakes out the position that it currently has, specifically LBHI -- has a cost of funds of about 12.5 percent. We're not aware, Your Honor, that LBHI is, in fact, still in the business of either lending or borrowing money. And with 15.7 billion dollars in its accounts right now, and acknowledging the good work of Bryan Marsal and the folks who are working on this Chapter 11 bankruptcy proceeding, it struck us as at least ironic and potentially discordant that Metavante has been asked to pay about 13.5 percent default interest all in. So, ninety day LIBOR plus LBHI's stated cost of borrowing plus one percent which is a very healthy amount of interest in the circumstances where there isn't a record that LBHI does, in fact, continue to borrow and at that rate.

So those are the only two comments that I'll add on the default interest issue, Your Honor. I think the rest of the pleadings and, again, begging your indulgence for the nine pages that we sent to you last Friday, I think the rest of the pleadings were well done on both side and you have a complete record before you.

THE COURT: Okay.

MR. ARNOLD: Thank you.

THE COURT: Thank you, Mr. Arnold. I thought we were going to handle both the motion to alter or amend and the stay at the same time. But since it's been broken into parts, why don't we talk about the motion to alter or amend and then we'll talk about the stay?

MR. SLACK: Your Honor, Rich Slack again from Weil Gotshal for LBSF. Your Honor, I'll also try to be brief but I think the key issue or at least one of the key issues which is a gatekeeper issue on the Rule 59(e) motion is whether that procedure is appropriate in this circumstance. Essentially, Metavante requests that Your Honor consider new arguments that could have been made but for whatever reason were not made during the extensive briefing of the motions. And as Your Honor is probably well aware, recent decisions have held that a motion to alter and amend is "an extraordinary remedy to be employed sparingly in the interest of finality and is appropriate only when a Court overlooks controlling decisions or factual matters that were put before it on the underlying motion and which, if examined, might reasonably have led to a different result." That's the recent decision by Judge Buchwald from June of earlier this year in Johnson v. Killian (ph.). That Court also stated that "it is not appropriate to use a motion for reconsideration", again speaking about 59(e), "as a vehicle to advance new theories a party failed to

articulate in arguing the underlying motion".

The two issues that Metavante raises here on the 59(e) motion, both could have been raised below. Neither was raised in either of the briefings. And moreover, Your Honor, I think it's pretty clear from the briefs that came in that Metavante can point to no authority whatsoever and certainly not any controlling authority that requires that a debtor provide adequate assurance of future performance as a condition for performance by a counterparty to an executory contract.

With respect to the default rate, Your Honor, much the same way as the adequate assurance argument, as Mr. Arnold recognized, they had a calculation of default interest. And in the ISDA master, which is Exhibit 1 to the motion that we made, there's a definition of default interest. And it's important because it says the default interest rate is "a rate per annum equal to the cost" -- and this is the important part -- "without proof or evidence of any actual cost to the relevant payee as certified by it if it were to fund or funding the relevant amount plus one percent annum".

The way the ISDA document works is that there is no requirement that you have an evidentiary hearing. There's nothing that requires the Court set that. Now we've said in our papers, Your Honor, that it -- we're happy to have Mr. Arnold talk to us about it or raise a different motion. We're not sure that that would be appropriate. But the important

part about the two issues that Mr. Arnold raises in his motion for reconsideration are that they really have nothing to do with whether Metavante performs under the contract. In other words, Metavante could perform and have raised these issues after performing whether or not in the future interest rates turn. That hasn't happened yet. There's no reason that Metavante can't perform on their contract as Your Honor has ordered. And similarly, with respect to the default interest, there's no reason if there is an attack that they wish to make that they couldn't do that afterwards after they perform. So neither of these arguments should prevent Metavante from performing under the terms that Your Honor set forth.

With respect to the merits, Your Honor, I think Your Honor is well aware of the various arguments on the adequate assurance points that were made in the letters. The only thing I would add is that there is not a single case cited by Metavante where the Courts provided some kind of adequate assurance for future performance. Every one of those Courts discussed saying that for providing a good or service, you're entitled to get paid for that service. But none of them say that you're entitled to some kind of adequate assurance for future performance. And that, I think, is the real hole. In particular, Your Honor, I think Metavante relies on a number of cases that are completely in opposite, that don't stand for the propositions that they state. And I expect Your Honor has

already read those.

With respect to the interest point, Your Honor, again, I think it's the point I raised before that there is a contractual provision and that contractual provision was followed by Lehman. And it does not prevent Metavante from performing. And, in fact, there is no provision within that contract if they were just performing under the contract for having an evidentiary hearing on the default interest rate. We cite a case, the Finance One case v. LBSF where LBSF was on the other side of this issue. That was from July of 2003. And we believe that that stands for the proposition we set forth.

So with respect to the actual calculation, Your Honor, of the interest rate, I would just like to touch upon that. And that is that while there isn't -- this is not the appropriate time or the appropriate forum and nor do we think there is an appropriate challenge to it. The fact is that it's derived essentially from looking at the DIP loan rate, realizing that that was secured, having a factor for the sense that this kind of cost of funds is unsecured and then adding the one percent. So we think there's a -- not only a justifiable way of looking at that interest but, frankly, it is an appropriate one for this contract, and low, if you actually looked at the actual cost of funds that Lehman would have to undertake in order to borrow.

With that, Your Honor, I'm through unless you have

any comments on the first motion that you'd like to ask.

THE COURT: No. Thank you.

MR. SLACK: Thank you.

THE COURT: Why don't we move on to the stay?

MR. ARNOLD: Your Honor, guided by the same admonition to keep our comments brief, ultimately what we seeking in connection with the motion to stay is your potential blessing of the use of an escrow arrangement in lieu of a supersedeas bond. Under Local Rule 8005-1 of the Local Rules of the United States Bankruptcy Court for the Southern District of New York, Metavante would be obliged to, upon filing its notice of appeal, to file a supersedeas bond equal to the sum of the amount the Court ordered to be paid plus eleven percent plus 250 dollars to cover costs. In addition to that, Metavante would be obliged to pay the premium that the surety charges for a bond of that size which might be in the range of, say, twelve million dollars or so.

Plainly and simply, Your Honor, and using the creative language from Judge Posner's decision, we were hoping that the Court would entertain the concept of using an escrow agreement basically to save the 120 or 130,000 dollars in premiums that would otherwise be paid to the surety, money that could easily be applied towards a consensual settlement of this case.

But in any event, it's not a question of whether

Metavante is bondable or not. That's not the point at all. We were looking for the Court's input in simply trying to save some cost on the appeal. That's the essence of the motion to stay. It's not your typical motion to stay where you've got somebody worried that the judgment creditor is going to garnish accounts or it might put the company out of business which actually was the underlying in the Western Union case where Western Union was on the wrong side of a treble damage antitrust award for some thirty-six million dollars. No. Purely and simply, Your Honor, we're looking for your creativity and everybody's creativity to look at an alternative way of preserving and protecting Lehman during the pendency of the appeal through the use of an escrow arrangement the terms of which, I think, would be fairly easy to get to.

So that's --

THE COURT: Are you planning to comment at all on your entitlement to stay or are you relying on your papers?

MR. ARNOLD: I'm sorry, Your Honor?

THE COURT: Are you planning to comment at all with respect to your entitlement to a stay, in the first instance, or are you relying on your papers?

MR. ARNOLD: We're relying on our papers, Your Honor. You'll appreciate that it's somewhat awkward to talk about the likelihood of success on the merits in front of the very individual who issued a thoughtful decision.

THE COURT: It happens all the time. It's not a problem.

MR. ARNOLD: This is a case of first impression. There are important issues about the interplay between New York law and the Bankruptcy Code. The reason we think that we will prevail on appeal, Your Honor, is because we think that the district court will uphold the vitality of Section 2(a)(iii) on account of the pre-petition, at least as to LBSF, default occasioned by LBHI's filing. And we think that Lehman is wrong to conjoin LBSF and LBHI in a single sentence. Based upon the research that we did in that area, and a particular Professor Whyte's treatise on the topic, what we saw is that the National Commission for the Reform of the Bankruptcy Laws in its report issued in 1977 initially recommended that Congress continue a distinction between the applicability of ipso facto clauses in so-called reorganization cases, then Chapter XI now Chapter 11, and liquidation cases, now Chapter 7.

So when Congress ultimately did enact Section 365, Professor Whyte said that Congress gave voice to the so-called Queensland decision and made the decision to make Section 365 and the so-called ipso facto clause equally applicable to all chapters. So a Chapter 7 trustee, under the Bankruptcy Code, has substantially more powers than his counterpart did under the Act such that the use of the word "the case" and "a case" gives voice to Congress' desire to make it clear that Section

365, housed as it is in the Chapter 3 section of the Bankruptcy Code, is equally applicable to both Chapter 7 and Chapter 11.

I think that's -- I mean, there are other issues on appeal, Your Honor. But I think that's the one that's really, from an electoral standpoint, one of the more interesting and why, respectfully, of course, we think, Your Honor, that Metavante will prevail on appeal. But as to the balance of our arguments on the motion for stay, I'm certainly happy to stand on our written submission.

THE COURT: Okay. Mr. Slack?

(Pause)

MR. SLACK: Your Honor, in its motion to stay, Metavante, I think, correctly cites to Rule 8005 as the appropriate standard and that further granting a stay is in the sound discretion of the bankruptcy court. And while Mr. Arnold talked about the first prong of that, the likelihood of success on the merits, there's other prongs that we think are equally not met here such as whether Metavante will be injured absent the stay, whether the stay will have an effect on Lehman and whether and where the public interest lies.

Your Honor, with respect to the merits, I'm not going to belabor the merits. I think Your Honor is well aware of the underpinnings of your own ruling. But I would like to raise one point, Your Honor. Yesterday, Metavante filed a supplement attaching three, for lack of a better description, articles

that discuss Your Honor's decision in Metavante. And while there are many more than three, if you go on the internet, they chose those three and filed them in a supplement.

One of those, the last one, was put out by the ISDA legal department itself. And that was on September 30th. And it sets forth questions and answers about the Metavante decision that Your Honor rendered. And while I think it's interesting reading, one of the questions is as follows: is the decision consistent with the overall structure of the ISDA master agreement and the safe harbors? And the answer by ISDA was yes. The ISDA master agreement evolved into a two-way payments document under which and in the money defaulting party is to be paid upon termination years ago in part in response to bankruptcy law concerns in a variety of countries. Certainly, the ISDA master agreement typically does not require termination of a defaulting party. And it does allow a non-defaulting party to spend performance to a defaulting party. The ISDA master agreement, however, leaves the use of these mechanisms to the discretion of the non-faulting party and, implicitly, applicable law. Nowhere does the ISDA master agreement declare a non-defaulting party able to stand still forever on these mechanisms. As for the U.S. Bankruptcy Code safe harbors, they speak only in terms of rights to terminate, net and access collateral. The careful exercise of Section 2(a)(3) rights may well be viewed as part and parcel of these

rights but it is harder to argue that the safe harbors protect rights not to terminate and not to pay.

The ISDA document later goes on and asks the question, is the Metavante decision a surprise and answers that with a resounding no. Thus, the basic tenets of Your Honor's decision have been supported by ISDA consistent with the governing master and we think that adds to what we believe is the strong likelihood that the appeal will not succeed, Your Honor.

With respect to irreparable injury, while no party wants to be ordered to perform a contract, especially one that requires payment, Metavante has not shown that it will suffer any harm by paying the money that it owes. Metavante has recently engaged in a transaction that's been the discussion in a number of hearings and conferences. And Metavante informed the Court that the combined company has revenues, I believe -- this is by memory but I believe it was somewhere in the five billion dollar range.

So there's no evidence in the record or showing that if the appeal is granted that -- or there's -- and there's a final order reversing Your Honor that LBSF will not be able to pay the money and there's no harm to Metavante in paying it.

With respect to the debtors and the harm on the debtors, Your Honor, the point that's not lost on any of the counterparties that are listening and watching what the Court

does in Metavante is that if the Court were to allow Metavante to avoid its performance despite a court order, it would have a detrimental impact on the debtors in their efforts to continue to recover money because nobody's going to pay if Metavante doesn't have to pay.

Finally, Your Honor, with respect to the undercurrent of Mr. Arnold's argument -- seems to be saying that he can go in and get a stay by virtue of a bond. And, Your Honor, that's not the case under 8005, Your Honor. Your Honor first has to decide that a stay is appropriate. And then if a stay is appropriate then the question is what is the appropriate bond that Metavante should post in order to get that stay. And while I don't know what Your Honor is considering today, I would like to take a moment and talk about the bond because I think there is a misconception on Metavante's part as to what a bond would entail here.

Metavante treats this order as if it is an order to pay past amounts due. Now when Your Honor first issued the order for Metavante to perform, the amounts that were due at that time by Metavante to perform were approximately 6.6. million. After that, Your Honor, there was one more payment date that's come and gone and so that amount is now eleven million. And this contract goes through 2010. So the amounts that would be due over the course of this appeal assuming, for example, that the interest rate stayed the same would not be an

eleven million dollar bond. The amount of the bond that would have to be put up here -- and I'd like to talk about two different concepts. If you assume that interest rates stay the same and don't change then in addition to the eleven million, Metavante would owe approximately twenty-five million on each of these -- not on each of the payment dates but a total over the time. I would add, though, Your Honor, that if you look at interest rate curves, which is how the people who really understand these swaps look at it, and you look at the interest rate curves as to what people based on the forward markets think interest rates are going to do, the amount that Metavante would owe in addition to the eleven million is more like thirty-three million when you include the default interest.

So it's our position, Your Honor, and I think it's clear under the case law, that if Metavante were to post a bond, that bond would have to protect LBSF during the course of the pendency of the appeal. And the amount of that bond would be not the amount that they owe now. The amount of the bond has to be what would protect the estate during the course of the appeal. And that amount, Your Honor, we contend is, using the forward looking curves, which again is about thirty-three million, plus the eleven million plus -- that they owe now for about a forty-four million dollar bond. And at the very least, if you look at interest rates where they are right now, that bond would have to be closer to thirty-seven million.

Your Honor, the last point I guess I want to make just so it's clear is that there are provisions in both the Bankruptcy Code and the Federal Rules of Civil Procedure that allow for automatic stays upon the posting of a bond in certain cases. And those cases are where you have a money judgment for a sum certain. And that's 62(d). 62(d), however, is not applicable here for a couple of reasons. First, 7062, which incorporates Rule 62, very clearly states that it's applicable only in adversary proceedings. And Bankruptcy Rule 9014 does not incorporate Rule 7062 for contested matters. In situations outside of adversary proceedings, Rule 8005 applies which is exactly what Metavante, in their papers, suggest applies and we agree.

Second, and maybe just as important, is that Rule 62(d) is not applicable here where the order that Your Honor issued is one for performance under a contract and not a sum certain. And in particular, Your Honor, I would like to cite one or two cases that make this point. For example, Your Honor, the Tower Automotive at 2007 U.S. Dist. LEXIS 49282, which is Southern District, July 2nd, 2007, is a case that's very closely to the point. There, you had a defendant which was an insurance company that moved for a stay of the Court's order holding it was obligated to pay certain defense costs in connection with a lawsuit brought. The Court held that the insurance company had to continue to perform under that

contract. And the Court held that because its ruling was not a monetary judgment but rather for the insurance company to perform that, as it said, "The decision awarded no fixed sum of money. Indeed, the parties agreed that the amount due under the insurance policy is currently unknown. As such, Rule 62(d) is inapplicable."

In both this case and that case, very similarly, this Court's decision that Metavante has to perform will undoubtedly require that it pay money. But performance under a contract is very different. There is no sum certain. And as we've seen since Your Honor's last ruling, the 6.8 million that was due at that time is now eleven million. And I think Mr. Arnold suggested that in November, almost certainly, his client's going to have to pay more money. And so consequently, Your Honor, we don't believe that there's any -- we don't believe that there's any justification for a stay either under Rule 8005 under the factors -- and I have to correct something I said before. I think I had it backwards when I said that if the rates stay the same, it's a thirty-three million dollar -- I just want to clear -- I had it backwards. If the rates stay the same, it's thirty-three million dollars. If you use forward curves, it's twenty-five million dollars, Your Honor. So I had that backwards but now it's correct.

So that's what I have to say unless you have any questions, Your Honor.

THE COURT: No, thank you. Anything more? Oh, the committee would like to speak, Mr. Arnold.

MR. FLECK: Good morning, Your Honor. Evan Fleck of Milbank Tweed Hadley & McCloy on behalf of the official committee of unsecured creditors. Very briefly, Your Honor, and it probably comes as no surprise to the Court that the committee rises in support of the debtors' position with respect to both of these motions just as the committee actively participated in the original motion to compel performance. And it's for the same reasons. And we worked closely with the debtors in connection with the pleading although we didn't file a letter brief in connection with this morning's hearing.

Your Honor, the committee's position is that there is, as the debtors stated, there is no basis to alter or amend the decision. I'm going to speak, with the Court's permission, with respect to both the motions --

THE COURT: That's fine.

MR. FLECK: -- that are before the Court. Metavante has not met the legal standard to alter or amend this Court's decision. And it appears from the committee's perspective that while Metavante may have other relief that it's seeking from this Court, adequate assurance or otherwise, that now is not the time to seek that relief; it's procedurally improper. And that's particularly important from our perspective, Your Honor, because of the effect that Metavante's action now, after a

decision of this Court has been rendered, has on the efficient and effective administration of these estates and particularly with respect to the derivatives book.

The committee is particularly focused on the derivatives book as an asset that requires significant attention to maximize the return to the unsecured creditors of these estates in a timely and an appropriate manner. And the conduct of one counterparty with respect to one contract that is representative of a tremendous book of contracts, of which the Court is well aware, very well may, if it has not already, have a serious and detrimental effect on the administration of these estates. And while -- if the motion had been procedurally proper or based properly in law, the committee has no issue with obviously a party coming for relief before this Court. But after a decision has been rendered and a counterparty elects not to perform and instead asks this Court for a different form of relief, the committee finds that to be particularly improper and requests that the Court deny that relief.

The committee is also mindful of the significant costs that have gone in on the side of the estate in order to do what it believes it should not be required to do which is to ask a party to adhere to this Court's decision. And unless there's any questions, thank you, Your Honor.

THE COURT: I don't have any questions. Thank you.

Mr. Arnold, do you want to --

MR. ARNOLD: Very briefly, Your Honor.

THE COURT: -- speak some more?

MR. ARNOLD: I actually am delighted that my esteemed colleague, Mr. Slack, raised the question of how a supersedeas bond might be crafted in this instance. Although Metavante's motion to approve a supersedeas bond is not before the Court because we are hopeful, frankly, that Your Honor will entertain the concept of an escrow arrangement, if it comes to the point of seeking such relief, just to give you a sense of what Metavante's reading of Rule 8005 is, we believe that the advisory committee was careful in its use of three subordinate clauses in the precatory language of 8005: that a party may move for a stay, they may move for approval of a supersedeas bond or for such other relief. It is certainly not our hope that this matter, while it goes up on appeal, does so in the context of a supersedeas bond. It is our hope, Your Honor, that you will indulge our request to permit the establishment of an escrow arrangement. But if it does, let me tell you what the sureties and bonding companies have to say about the point raised by Mr. Slack.

The relief sought on May 29th, 2009 in the underlying motion was for the payment of the amount then due and owing. The pleading, if you want to view the motion as a complaint, asks that Metavante pay $6,640,138.01 in reset payments and

$359,215.37 in interest payments. This Court granted the motion. And, utilizing the form of order that had been submitted with the motion, directed Metavante to pay the reset amounts from the three dates that were referenced in the order as well as default interest. And then there's this additional sentence "and to continue to perform the obligations under the interest rate swap agreement". What the bonding companies tell us, just so the Court knows that we've thought about this, is that in this circumstance, the way a supersedeas bond is presented is the surety bonds the appellant with respect to the amounts that are currently due and owing and then submits riders when and if additional amounts become due and owing. So that's the protocol, the mechanism, that sureties -- and has come up in the law of suretyship and how they deal with the unique circumstances between an order to perform and the fact that some of the amounts are not currently due and owing. Reasonable people can differ about what's happening to the involuted yield curve and what will happen, predictably or not, with respect to the U.S. or world economy and its impact on the ninety day LIBOR rate. We're able, I think, to come to an agreement right now on what the resets are and do that calculation and pending your input on default interest, perhaps on that issue as well.

I also want to respond, Your Honor, to the commentary raised now by the committee. Metavante acknowledges the

importance of this decision and that's why it will file an appeal upon the ultimate disposition of the motion to alter or amend. We had hoped that the Court could find a way to consider how the rights of the nondebtor counterparty can be protected but, if not, we'll abide the Court's decision.

What is troublesome about the commentary there is that it seems to suggest that a party does not have the right to pursue its legal rights and then, if it loses, to seek an appeal. It's almost like there's a sense of a taint that in some way Metavante has acted inappropriately by doing what derivatives counterparties have done forever with respect to an event of default. It is not -- it is a blinding glimpse of the obvious that the nondefaulting counterparty has the right to suspend performance. The unique circumstances of this case raise the specter of what happens in the context of a Chapter 11 filing. And while I appreciate -- I really appreciate -- the debtors' desire to conjoin and stand behind the ipso facto clause protections, the essence of Metavante's position is that it was not LBSF's filing that gave rise to the right to suspend performance but LBHI's filing.

So, yes, we appreciate the desire of the debtor to harvest these accounts receivable, if you want to view it in those terms. It's the same reason why they sought permission from your Court to assume and assign the interest rate swap agreements to third parties and in that way to harvest what

might be the mark to market insight of that contract with respect to an assumption process. But it is decidedly not fair to say that Metavante, pursuing its own rights, has in some way impeded the administration of the estate. How other counterparties view Metavante's decision to appeal and what likely outcome of that decision would be, we leave that to their good judgment.

You have before you Metavante and LBSF. There's a respectful disagreement about the merits. We were seeking the Court's clarification and, hopefully, the Court's willingness to embrace an escrow arrangement. But if not, we'll file our notice of appeal and, frankly, give very thoughtful consideration to a supersedeas bond and likely interact with counsel for Lehman because it appears that we have a respectful disagreement about how such a bond might be crafted. I've given you the benefit of our interactions with the bonding companies this week. But it certainly is our hope not to have to file a bond to get a stay pending appeal, Your Honor.

THE COURT: Mr. Slack, do you have anything more to say?

MR. SLACK: The only comment I wanted to make, Your Honor, is that, just so it's clear, it's Lehman's position today that a stay should not issue and that it's not appropriate and that Metavante should be ordered to perform. So that's our position not that there should be a bond that was

discussed in the interest of sort of completeness in case Your Honor reached that issue which, again, we don't think Your Honor should. Thank you.

THE COURT: Okay. This hearing was scheduled as a consequence of an exchange of correspondence that took place following the filing by Metavante of two motions. The first motion under Rule 59(e) was filed on September 25th. The second motion, the motion for a stay, was filed on October 8th. That led to my receipt of a letter from Mr. Slack dated October 13th complaining that the procedures adopted by Metavante were prejudicial to the debtors because of significant delay associated with a hearing that had been scheduled pursuant to the case management procedures for sometime in November.

I received a letter from Mr. Arnold dated October 16th which also happened to be the date of a pretrial status conference or chambers conference that took place by phone a week ago today.

As a consequence of that telephone conference, I scheduled a hearing today to address both the Metavante motion to alter or amend and the Metavante motion for a stay. While there were many areas of disagreement in the correspondence that I had received, one area that seemed to be an area of consensus was that the Court could accelerate the timing for a hearing to consider both of these pending motions. I picked this morning and I appreciate the fact that parties have, in

certain instances, traveled to court in order to participate in this hearing.

One of the statements that I made during the chambers conference was that I would accept in lieu of further briefing the correspondence from Mr. Slack and from Mr. Arnold. Just from a case management perspective, I would prefer that not to become standard for the Lehman case. I think it is better practice for matters as important as this to be briefed in the ordinary course with pleadings filed and docketed. Both letters are, however, docketed and available for review on the ECF system.

I'm going to start with the motion to alter or amend. I note that debtors' counsel takes the position, and the committee joins in this argument, that the motion to alter or amend is really procedurally inappropriate because the matters that are the subject of that motion were not presented during the briefing and argument in connection with the original Metavante motion to compel.

Procedurally, debtors filed a motion to compel performance under the applicable interest rate swap agreement between LBSF and Metavante. A hearing was held on July 14th. Following that hearing and some encouragement from the Court that the parties accommodate their different positions by agreement, there was a status conference that took place on September 15th at which time Metavante both by letter and by

oral request, sought that that matter be adjourned to a later date in October so the parties would have sufficient time to address a possible settlement of issues arising under the ISDA swap agreement. That request for an adjournment was opposed by the debtors and the Court, at that hearing, read into the record the ruling which has led to not only today's hearing and motion practice but apparently considerable discussion within the community of market participants that deal with ISDA agreements.

I agree with the debtors that the issues presented in the motion to alter or amend are, for all practical purposes, inappropriate matters to present in a motion for reconsideration because neither was addressed in papers presented by Metavante in opposition to the motion to compel nor was the issue of adequate assurance or default interest a subject of oral argument.

However, I am going to comment briefly on both issues. But by doing so, I do not wish to take away from the fact that these are matters that probably could be disposed of by my simply saying these are inappropriate matters for a decision at this point and the motion is simply denied.

On the issue of adequate assurance, I believe that Metavante is in a somewhat unusual fact pattern in part because of the very deep pockets of LBSF and LBHI. The letter sent by Mr. Arnold on October 16th acknowledges, as does comments made

this morning during oral argument, that Lehman Brothers is sitting on a huge pile of cash. I don't know what today's numbers would reveal but it's something in the neighborhood of more than fifteen billion dollars. That is enviable liquidity. It is difficult for a counterparty dealing with a party such as Lehman Brothers and its affiliates to complain about meaningful economic risk associated with making a payment into that high a mountain of cash. For that reason, regardless of whether or not adequate assurance may be a sensible concept in dealing with a shaky counterparty, I see absolutely no factual basis for the assertion that adequate assurance is an appropriate remedy to protect a nondefaulting counterparty dealing with Lehman Brothers.

As to the subject of default interest, I believe that that is a matter which, in the ordinary course of swap terminations, is dealt with without court intervention. And I see absolutely no reason for the bankruptcy court to become involved, at least at this point, in a dispute relating to the appropriate calculation of default interest. I do not believe that it represents a matter that requires judicial attention prior to making a payment. In this respect, the Metavante situation is no different from situations that have arisen in this bankruptcy case between Lehman Brothers and other counterparties involving transactions of like type. There are a set of procedures judicially approved relating to alternative

dispute resolution in respect of derivative transactions. In certain instances, as I understand it, Lehman Brothers may be asserting that certain counterparties in other transactions may still owe money based upon Lehman's calculation of amounts payable on termination. I do not know because it is not before me the degree to which these ongoing disputes relate to the calculation of default interest or other matters that might be part of a termination calculation.

But the situation involving Metavante is no different from that of any other swap counterparty. If there is a dispute relating to the amount payable as between Lehman Brothers and any counterparty, presumably that dispute will be resolved by agreement of the parties, by alternative dispute resolution to the extent applicable or, if it gets that far, by the Court in an appropriate evidentiary hearing. At this juncture, I see absolutely no need to alter or amend the order compelling Metavante to perform this particular executory contract as it relates to the demand made by Lehman Brothers for the payment of default interest which demand, at least superficially, is predicated upon a set of procedures that are generally applicable in swap transactions.

For these reasons, I deny the motion to alter or amend.

Turning to the separate motion filed on October 8th for a stay, I note that the parties have spent considerable

time dealing with how to bond, most appropriately, a stay pending appeal assuming the Court were to issue such a stay. That whole subject matter becomes irrelevant because I see absolutely no basis for staying any appeal that might be filed by Metavante. I note that procedurally no appeal has yet been filed although both Metavante and the debtors assume that such an appeal will be filed promptly after the disposition of the motion to alter or amend so I assume that will happen in the next several days.

Metavante's motion appropriately identifies the standards generally applicable to a bankruptcy court's consideration of a motion for a stay pending appeal. And I address these factors notwithstanding the fact that there is no appeal currently pending. The four factors are the likelihood of success on the merits; whether the moving party will suffer irreparable injury; whether other parties will suffer substantial harm; and whether there will be harm to the public interest.

Metavante assumes for purposes of its motion that the last factor in this quartet, that involving harm to the public interest, is not applicable. Both the creditors' committee and the debtors assert they should prevail on all four. Ordinarily, the factor that most warrants consideration in deciding whether to issue a stay is whether the party seeking the stay will suffer irreparable injury. In this instance, I

find absolutely no support for the proposition that Metavante, which has been compelled to perform under the interest rate swap agreement, will suffer any harm whatsoever if it complies with the order and makes the payments required under the swap agreement.

The fact pattern here is somewhat unusual. But what it also demonstrates is a nondefaulting counterparty to a swap agreement that has chosen its poison. Metavante had the ability, upon the occurrence of the LBHI bankruptcy and upon the occurrence of the LBSF bankruptcy, with a short period of time thereafter, to exercise under the safe harbor termination rights but elected not to do so. For reasons expressed in the Court's bench ruling on September 15, Metavante, quite self consciously, chose to play the market presumably believing that it had a colorable legal basis to do so. In having done that, in effect, it has increased its own exposure by making what seems to be in retrospect an inopportune bet as to the future direction of the interest rate markets. This is, when looked at in a nonbankruptcy setting, not a garden variety agreement but a garden variety swap agreement. In that sense, in paying Lehman amounts that come due periodically, the so-called reset payments, Metavante is doing precisely what it agreed to do and by not having terminated the agreement is doing exactly what it should have known it was obligated to do.

Under the circumstances and recognizing that

Metavante is, particularly since its recent merger transaction with another business, a very, very large financial enterprise in its own right. It can well afford to make these payments. And to the extent it may succeed in any appeal that it chooses to file tot he district court or beyond in obtaining an overturning of the Court's order of September 17th that was entered in respect of the September 15th bench ruling, it will have a highly liquid counterparty against which it can make a claim to recover monies paid.

Irreparable injury in the present setting is almost a laughable concept. This is pure and simply an ordinary course transaction between apparently liquid counterparties.

As to the other issues in the quartet of factors, I make no comment as to Metavante's likely success on the merits of an appeal other than to say that having given this matter some thought, I rather expect that a district court judge considering this matter will agree with me. Nonetheless, I recognize that this is a matter as to which there is little controlling precedent and about the only comparable authority that I am aware of is from Australia. Under the circumstance, a district court reviewing a matter de novo conceivably could come out with a different result. I'm not in a business of predicting outcomes, only making decisions of matters that are presented before me. Recognizing, however, the issues that are involved, I am unable to say that there is any likelihood of

success on the merits. There is, I suspect, only a mere possibility.

As to the harm to be suffered by the Lehman Brothers entities and perhaps also by the public, I believe that there is the potential for significant harm if contracts such as the one before me now are not enforceable by LBSF and other Lehman entities in accordance with their terms. The creditors' committee has spoken to the collateral damage associated with Metavante's refusal to pay both its refusal to pay leading up to the September 17 order compelling performance and its post hac refusal to pay. Metavante has the rights that it has to pursue both to seek appropriate clarifications in this court and to pursue appellate rights in the district court and beyond, if appropriate. But that doesn't mean that it can do so and change the nature of the contract that it has with the debtors and it has chosen not to terminate.

Because this is, in effect, a test case and an example of other comparable transactions between Lehman Brothers and counterparties, there is a great deal of public interest in the outcome of this dispute. The mere fact that ISDA has written publicly on this subject further indicates that this is a matter as to which there is public interest.

Accordingly, I believe that there has been a failure on the part of Metavante to show cause in each of the four categories that courts typically consider in deciding whether

to grant a stay. For the reasons stated, the motion for a stay is denied.

Is there anything more?

MR. ARNOLD: No, Your Honor.

THE COURT: Thank you. We're adjourned.

(Whereupon these proceedings were concluded at 11:22 a.m.)

I N D E X

R U L I N G S

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

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Veritext LLC

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: October 26, 2009